Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1995

Toni Darlene Kimpel,

Petitioner,

v.

State of Alabama,

Respondent.

On Writ of Certiorari to the
Alabama Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED

I. WHETHER A WOMAN POSSESSES A FUNDAMENTAL CONSTITUTIONAL RIGHT UNDER THE NINTH AND FOURTEENTH AMENDMENTS TO EMPLOY A TRADITIONAL DIRECT-ENTRY MIDWIFE TO ASSIST WITH A PLANNED "HOME BIRTH."

II. WHETHER THE ALABAMA STATUTORY SCHEME WHICH PROHIBITS BOTH THE PRACTICE OF TRADITIONAL DIRECT-ENTRY MIDWIFERY AND "HOME BIRTH" VIOLATES A WOMAN'S RIGHT TO CHOOSE THE MANNER AND LOCATION OF HER CHILD'S BIRTH.

PARTIES TO THE PROCEEDING

The names of all parties to this proceeding appear on the cover.

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OPINIONS BELOW

The opinion of the Circuit Court of Mobile County, declaring the Alabama statutory scheme unconstitutional is not reported, but is attached hereto as Appendix C.

The opinion of The Alabama Court of Criminal Appeals is not yet reported but is attached hereto as Appendix D.

JURISDICTION

The Alabama Court of Criminal Appeals issued an opinion denying petitioners' constitutional claims on March 3, 1995. (Appendix D). A timely Petition for Certiorari to the Supreme Court of Alabama was filed by petitioner on April 27, 1995. On June 30, 1995, the Supreme Court of Alabama denied petitioners' Petition for Writ of Certiorari, a copy of which is attached hereto as Appendix E. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> " . . . No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; . . . "

United States Constitution, Amendment XIV, Section 1.

* * * * *

> "The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Amendment IX.

* * * * *

> (a) It shall be unlawful for any person other than a licensed professional nurse who has received a license from the State Board of Nursing and the Board of Medical Examiners to practice nurse midwifery in this state. Any person violating this sub-section shall be guilty of a misdemeanor.

> (b) Nothing in sub-section (a) of this section shall be construed as to prevent lay midwives holding valid health department permits from engaging in the practice of lay midwifery as heretofore provided until such time as said permit may be revoked by the County Board of Health.

Code of Alabama, § 34-19-3 (1975).

* * * * *

> It shall be unlawful for any person holding a license as a nurse midwife to attend any cases except cases of normal childbirth, as defined in § 34-19-2, or to perform manipulations of any kind. In all cases in which the child is not delivered spontaneously within a reasonable time, the nurse midwife shall notify a qualified physician immediately and make no effort to deliver the child except under the authorization and supervision of such physician.
>
> All deliveries must be planned to take place in the hospital.

Code of Alabama, § 34-19-8 (1975).

STATEMENT OF THE CASE

On August 23, 1976, the Alabama legislature passed Ala.Code § 34-19-1 *et seq.* (Appendix F). By its terms, the said statutory provision restricted the practice of midwifery to licensed professional nurses, Ala.Code § 34-19-3(a), and required that "All deliveries must be planned to take place in the hospital." Ala.Code § 34-19-8. Prior to the passage of the above legislation, midwifery in Alabama was regulated by Title 46 § 168 of the Code of Alabama 1945. Title 46 § 168 required midwives to hold permits from a County Health Department but con-

tained no restrictions as to who could be a midwife or where births were to occur. A copy of Title 46 § 168 is attached hereto as Appendix G.

Although Title 46 § 168 was expressly repealed by Alabama Code § 34-19-1, the new statutory scheme contained a provision that appeared to retain the former practice of direct-entry and/or lay midwifery. Specifically, Ala.Code § 34-19-3(b) provides:

> (b) Nothing in . . . this section shall be construed as to prevent lay midwives holding valid Health Department permits from engaging in the practice of lay midwifery as heretofore provided until such time as said permit may be revoked by the County Board of Health.

On or about November 23, 1992, petitioner was charged in separate indictments with five counts of practicing nurse midwifery without a license in violation of Alabama Code § 34-19-3(a). Petitioner was also charged with one count of manslaughter resulting from a stillborn birth due to no fault of the petitioner. Subsequently, the manslaughter charge was withdrawn.

Thereafter, On January 29, 1993, petitioner filed a Motion to Dismiss the remaining indictments alleging that the statutory scheme regulating nurse midwifery was not applicable to her in that she was engaged in the practice of lay midwifery, not nurse midwifery, and further, that the statute, constitutionally, could not be construed to prohibit direct-entry and/or lay midwifery in that the right to employ a traditional direct-entry midwife to assist with a planned home birth was within the constitutional rights of privacy and equal protection under the Ninth and Fourteenth Amendments of the United States Constitution. (Appendix A).

On March 12, 1993, defendant's Motion to Dismiss was denied. (CR2).

On April 28, 1994, petitioner's Motion to Dismiss was refiled. (Appendix B). At a hearing on said motion, it was stipulated and agreed that Petitioner was a direct-entry/lay midwife; that she was not a nurse and had never held herself out to be a certified nurse midwife; that she did not have a license to practice nurse midwifery nor a permit to practice lay midwifery, although she applied for a lay midwifery permit and was told that such permits were no longer issued. (C.R. 26-27) Following the hearing, petitioner's Motion to Dismiss was granted. (Appendix C).

Thereafter, the State of Alabama filed a notice of appeal to the Alabama Court of Criminal Appeals alleging that the Circuit Court of Mobile County had found the Alabama statute to be unconstitutional. (C.R. 109-110). On March 3, 1995, the Alabama Court of Criminal Appeals reversed the decision of the Circuit Court of Mobile County holding as follows:

> (1) that the Alabama statutory scheme abolished the practice of lay midwifery and established nurse midwifery as the only form of legal midwifery allowable in the State of Alabama; (Ct. opinion at p. 6-7)
>
> (2) that the statutory provision providing for the continued practice of lay midwifery was merely a grandfather clause and that all who previously practiced under such clause had terminated their practice; (Ct. opinion at p. 7 n.3)
>
> (3) that the right to privacy does not extend to choosing the manner of childbirth, specifically midwifery; (Ct. opinion at p. 7) and,
>
> (4) that the Alabama statute regulating the practice of midwifery does not involve a suspect class and therefore does not violate the equal protection clause of the Federal Constitution. (Ct. opinion at p. 8)

In assessing the privacy and equal protection issues, the Court of Criminal Appeals applied a rational basis test. (Ct. opinion at p. 7-8)

Thereafter, petitioner filed a timely Petition for Writ of Certiorari to the Supreme Court of Alabama which was denied on June 30, 1995. (Appendix E).

REASONS FOR GRANTING THE WRIT

In *Planned Parenthood v. Casey*, ___U.S.___, 112 S.Ct. 2791 (1992), this Court recognized that the fundamental right created in *Roe* extends to a woman's decision to give birth, not just her decision to terminate her pregnancy. 112 S.Ct. at 2811. This principle had been implicit in prior cases stating or holding that fundamental privacy and/or liberty rights extended to the subjects of childbirth, procreation, and child rearing. Petitioner contends that the birth decision presumes and includes the fundamental right to employ a traditional, or direct-entry, midwife to assist with a planned home birth. Petitioner does not claim that the state lacks authority to regulate midwifery or home birth; Only that any such regulations may not abolish such rights nor unduly restrict them as in the instant case. Given the holding of the Alabama court it is essential that this Court hear this case in order to clarify its holding in *Casey* and prior privacy/substantive due process cases as it relates to the scope of the Woman's right to choose birth. Such a clarification is especially essential in light of the Alabama court's apparent belief that the viability and/or trimester approach established in *Roe* (and modified in *Casey)* allows them to apply the rational basis test to a prohibition of direct-entry midwifery and planned home birth. The Alabama Court has confounded "weight" and "fit" in a manner quite destructive of fundamental privacy and/or liberty rights by its

erroneous presumption that the existence of a compelling state interest allows them to apply the rational basis test. Such an approach ignores the crucial role of "fit" analysis to fundamental privacy and liberty rights. Petitioner concedes that the State possesses a compelling interest in the life and health of women, unborn children, and infants; Petitioner contends, however, that a prohibition of direct-entry midwifery and of planned home birth must be constitutionally evaluated under the "narrowly-tailored" branch of strict scrutiny. Under this test, the State should be required to prove that its deprivation of a fundamental liberty or privacy right is narrowly-tailored to effectuate the compelling state interests in question. It is important that this Court reassert the constitutional principle that wholesale deprivations of fundamental privacy or liberty rights must be evaluated under the "narrowly-tailored" test regardless of the stage of development, born or unborn, of the child or adult whom the state seeks to protect. Absent action by this Court, women and families in Alabama will continue to be subject to wholesale deprivations of their fundamental privacy or liberty rights whenever the State is able to claim that it acts in service of a "compelling interest", regardless of how unrelated such compelling interest really is to the deprivation of the right.

I. THE ALABAMA COURT OF CRIMINAL APPEALS ERRONEOUSLY HELD THAT THE ALABAMA MIDWIFERY STATUTE, WHICH RESTRICTS THE PRACTICE OF MIDWIFERY TO LICENSED REGISTERED NURSES AND REQUIRES THAT ALL BIRTHS BE "PLANNED HOSPITAL BIRTHS", DOES NOT VIOLATE A WOMAN'S RIGHT TO A PLANNED MIDWIFE ASSISTED HOME BIRTH GUARANTEED BY THE NINTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. THE LIBERTY TO EMPLOY A MIDWIFE TO ASSIST A HOME-BIRTH IS AT THE CORE OF THE SUBJECT AREA OF THE CONSTITUTIONAL RIGHT OF PRIVACY.

The Constitutional Right of Privacy has frequently been described by the Court in terms of subject area. Thus, the Court describes the right of privacy as relating to marriage, procreation, family relationships, childbirth, and child rearing. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). Choices regarding childbirth, including where one's child will be born and who will deliver one's child, are among the first child rearing decisions that parents make, *see*, Comment, *Childbearing and Nurse Midwives: A Woman's Right to Choose*, 58 N.Y.U. L. Rev. 661, 689 (1983). Such decisions are by no means trivial and can have profound affects on all aspects of family relations, including marital, sibling, and parent-child relationships. Success and experience of childbirth can have profound impact on the individual woman in particular, and family relationships in general. "Researchers have found that high-tech birth often leads to loss of self-esteem because it makes women feel that they have lost control over the most fundamental aspects of self. . . . Interventions in birth can lead to depression and difficulty

in adjusting to motherhood." Richard Wertz & Dorothy C. Wertz, *Lying-In, A History of Childbirth in America* 256 (expanded ed. 1989). Because direct-entry midwives and allelopathic physicians employ competing and contrasting approaches to childbirth, the choice to utilize the services of a midwife is more than a simple choice between birth attendants: It is a choice of philosophies with regard to one of the most intimate and personal matters that an individual woman and family face. Given the scope and magnitude of the childbirth decision, if childbirth is not within the subject area of the right of privacy, it is hard to see what else would be.

B. THE LIBERTY TO EMPLOY A MIDWIFE IS DEEPLY ROOTED IN AMERICAN HISTORY AND TRADITION.

In addition to subject area, this Court has repeatedly relied upon historical analysis to determine whether a claimed liberty, which is not enumerated in the text of the Constitution, is a fundamental right. Specifically, the Court has described as fundamental rights "those liberties that are 'deeply rooted in this Nation's history and tradition.'" *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion by Justice Powell). Under this historical analysis, it is equally clear that mothers possess a fundamental right to employ midwives under the Ninth and Fourteenth Amendments to the United States Constitution.

During the colonial period, and at the time of the enactment of the Bill of Rights in 1791, the vast majority of American births occurred in the home with the assistance of midwives. Birth was generally viewed as a natural process and a frequent social event in the lives of women. *See*, Richard Wertz & Dorothy C. Wertz, *Lying-In, A History*

of Childbirth in America 1-26 (expanded ed. 1989). Midwifery was universally legal, although some minimal regulation of midwifery existed. *See*, J. Litoff, *American Midwives* 5 (1978). New York City's 1716 midwife ordinance, for example, forbade the midwife from assisting in abortion. *See*, Wertz & Wertz, *supra*, at 7. By 1750, physicians began the process of competing with traditional midwives. As late as 1791, however, because physicians were comparatively expensive and few in number, and because women commonly objected to the presence of male physicians during birth, most births were still midwife assisted. *See*, J. Litoff, *supra*, at 7-10; R. Wertz & D. Wertz, *supra*, at 29-44.

During the nineteenth century, physicians intensified their competition with midwives and largely succeeded in displacing them among the upper and middle classes. Nonetheless, even by 1900 midwives attended approximately half of all births in America. *See* J. Litoff, *supra*, at 27, 136. When the Fourteenth Amendment was passed in 1868, midwifery was universally legal and almost completely unregulated. There was extensive competition among various kinds of "physicians". Women possessed and exercised extensive choices among a variety of different birth assistants. And, nearly all births occurred at home. *See e.g.*, R. Wertz & D. Wertz, *supra*, at 133 (less than 5% of women delivered in hospital in 1900). Choices regarding the person(s) assisting childbirth and the place of childbirth were by practice, law, and custom a matter of individual and family choice from the colonial period until the early part of the twentieth century.

Although the twentieth century produced a growing and unwarranted suppression of traditional midwifery, Massachusetts was the only state in the early 1900s to outlaw midwifery, J. Litoff, *supra*, at 141. Other states began to regulate midwifery. *See, id.* at 139-41. Nonetheless, during the early twentieth century traditional lay mid-

wifery remained generally legal and relatively unregulated.

After 1900, the number of midwife-assisted births rapidly decreased, with approximately half of all births having been midwife assisted. By 1930, only 15% of births were midwife-assisted. *Id.* at 139. By 1973 less than 1% of all births were attended by either traditional or nurse midwives. *Id.* at 142. Although the numbers of women actually exercising the personal decision to employ a traditional lay midwife to assist with home birth has obviously declined, this in no way effects the fundamental nature nor historical tradition of such a choice. There exists, moreover, a statistically small but culturally significant movement of women and families interested in reclaiming America's heritage of direct-entry midwifery and home birth; the Constitution protects the right to reclaim such traditional practices.

C. THE STATUTORY PROHIBITIONS OF THE PRACTICE OF DIRECT-ENTRY MIDWIFERY AND HOME BIRTHS PLACE AN UNDUE AND DISPROPORTIONATE BURDEN ON WOMEN AND FAMILIES WITHOUT SUBSTANTIAL ECONOMIC MEANS.

In addition to being an expression of family autonomy and health, the decision to employ a direct-entry midwife to assist with a planned home birth is often economic and pragmatic. Those employing the services of a traditional midwife are, in many cases, of moderate or below moderate means, often without the means to afford adequate health care insurance, and yet not necessarily qualifying for sufficient governmental assistance. Given the spiralling costs of obstetric and hospital care, many individuals could not otherwise afford prenatal and ob-

stetrical care if it were not for the availability of practicing direct-entry midwives. Contrary to the opinion of the Alabama Court of Criminal Appeals, Petitioner contends that her clients compose a class of individuals as has been defined under our body of equal protection laws and that the Alabama statutory scheme, which prohibits the practice of direct-entry midwifery and compels women to give birth to children in hospitals to which they have no access, places an undue burden on the rights of her clients which is disproportionally impacted and which she vicariously asserts.

II. STATE PROHIBITION OF DIRECT-ENTRY MIDWIFERY CONSTITUTES AN INFRINGEMENT OF A FUNDAMENTAL RIGHT WHICH MUST BE REVIEWED UNDER STRICT SCRUTINY.

Because women and families have a fundamental constitutional right to employ a direct-entry midwife to assist with planned home births, any law, Contrary to the holding of the Alabama Court of Criminal Appeals, infringing upon that right must be examined under strict scrutiny. As this Court knows, the usual test for strict scrutiny in the area of privacy rights requires the state to demonstrate that its statute is narrowly tailored to effectuate a compelling state interest. *See, e.g., Roe v. Wade*, 410 U.S. 113,155 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

A. ALABAMA CODE SECTION 34-19, *et.seq.*, PROHIBITING THE PRACTICE OF DIRECT-ENTRY MIDWIFERY AND HOME BIRTH IS NOT NARROWLY TAILORED TO EFFECTUATE THE STATE'S COMPELLING INTEREST IN THE LIFE AND HEALTH OF WOMEN, FETUSES, AND NEONATES.

Alabama Code Section 34-19, *et. seq.*, provides that all midwives must be licensed registered nurses and that all births must be planned hospital births. According to the Alabama Court of Criminal Appeals, such restrictions are valid because , " . . . the right to privacy does not extend to the manner of childbirth", and any rights the mother may have," are subjugated to the governmental interest in protecting hers and the child's safety." Court's opinion at page 7. In so finding the Alabama court applied a rational basis test. The court's decision with regard to the standard of review and the issue of safety is factually and legally flawed.

1. Home birth assisted by a direct-entry midwife is as safe, or safer, as physician assisted hospital birth.

Recent studies have demonstrated that home birth assisted by a qualified traditional midwife is safer, or as safe, as physician-assisted hospital birth. *See, e.g.*, Richard Wertz & Dorothy C. Wertz, *Lying-In, A History of Childbirth in America* 288-90 (expanded ed. 1989); J. Litoff, *American Midwives* 146-47 (1978); Adamson & Gare, *Home or Hospital Births?*, 243 J.A.M.A. 1732 (1980). The excellent statistical outcomes of midwife-assisted home births for both babies and mothers indicates that midwives are fully capable of determining when intervention or care by a physician is necessary to the health of mother or child and substantiates petitioner's claim that the prohibition of midwifery is not narrowly tailored to effectuate the state's

interests. In fact, these statistics demonstrate that the prohibition of direct-entry midwifery should fail even under a rational basis test, because the prohibition of direct-entry midwifery is not rationally related to the state's interests in maternal, fetal, and neonatal life and health.

2. *The Alabama statutory provision requiring all births to be "planned hospital births" unduly narrows a women's right to choose the manner and place of her child's birth and subjects her to unwarranted and unwanted medical procedures.*

The continuing successful use of midwife-assisted home birth explodes the myth that midwifery has been superseded by modern obstetrics. Unfortunately, modern obstetricians, like their predecessors of the nineteenth century, often employ unnecessary, dangerous, and counterproductive interventions. *See, e.g.*, Richard Wertz & Dorothy C. Wertz, *supra*, at 257-65. This phenomenon is best illustrated by America's astonishing Cesarean section rate of 24.4%, *see, Id.* at 260, apparently the highest in the world. An American woman "in the prime child bearing years between 20 and 24" has a 23 percent chance, or nearly one in four chance, of undergoing a Cesarean birth. *Id.* It is certainly reasonable and understandable that a contemporary healthy woman might desire to employ a midwife in order to avoid a hospital situation in which she will be subjected to numerous unnecessary and highly intrusive interventions, and a large chance of an unnecessary and serious surgical procedure. The denial of such a choice cannot be supported by reference to the state's compelling interests in her health, or the health of her child. Such a denial, moreover, compels the woman to submit herself and her child to highly intrusive invasions of their persons and bodies. The absence of an actual necessity for such forced submission to unwanted medical treatment must

render such restriction unconstitutional. *Cf., Cruzan v. Director, Missouri Dept. of Health*, 110 S.Ct. 2841, 2851 (1990) (all persons possess a liberty interest in refusing medical treatment).

Additionally, the statutory requirement that all deliveries be planned hospital deliveries unduly narrows the woman's access to qualified birth assistants. *Cf., Carey v. Population Services International*, 431 U.S. 684, 97 S.Ct. 2010 (1977). This is especially true in those rural Alabama counties in which medical obstetrical care at a local hospital is simply not available. It is wholly irrational to force women to choose between the invasive and unwanted treatment of medical obstetrics, and no care or treatment at all, when a better option — that of direct-entry midwifery — is available.

3. The restriction of the practice of midwifery to licensed registered nurses unduly limits access to midwifery services and home birth.

The American nurse midwife is a twentieth-century creation which "grew out of the midwife debate of the early years of the twentieth century." J. Litoff, *supra*, at 122, 142-43. Although defendant supports nurse midwifery as a legitimate and safe choice for pregnant women, nurse midwifery is clearly distinct from direct-entry (or traditional) midwifery, and should not constitutionally displace it. Nurse midwifery, whether practiced in a hospital or "birth center," is a distinct, medicalized profession, standing somewhere between physician-assisted hospital birth and traditional midwifery in the degree of reliance on interventionist procedures. *See*, R. Wertz & D. Wertz, *supra*, at 284-90; J. Litoff, *supra*, at 142-45. America's rich history of midwifery is essentially one of traditional, direct-entry midwifery. The development of American nurse midwifery should be viewed as a con-

tinuation, or reassertion, of the American tradition of choice in regard to persons assisting childbirth; it would be sad indeed if the relatively recent phenomenon of nurse midwifery instead was used to restrict the option of traditional midwifery which was universally available to American women from the colonial period through the start of the twentieth century.

It is particularly significant, within the context of this case, that nurse-midwives are forbidden from assisting planned home births in Alabama. Under these circumstances, it is particularly clear that nurse-midwifery is not an adequate substitute for direct-entry midwifery.

CONCLUSION

For the reasons stated herein, petitioner respectfully requests that this Honorable Court grant Petitioner's Writ of Certiorari and following consideration to reverse and render the decision of the Alabama Court of Criminal Appeals or in the alternative to remand this case with instructions to apply the appropriate standard of review.

Respectfully Submitted,

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APPENDIX A

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	CASE NOS. CC92-3974
	)	CC92-3975
v.	)	CC92-3976
	)	CC92-3977
TONI DARLENE KIMPEL,	)	CC92-3978
	)	CC92-4198
Defendant.	)	

MOTION TO DISMISS INDICTMENTS

Comes now the defendant, TONI DARLENE KIMPEL, by and through her undersigned attorney, and moves this Honorable Court to dismiss the indictments returned against the defendant on the following grounds separately and severally:

I. *Prosecutional Misconduct in Violation of Defendant's Right to Due Process and Equal Protection Under the State and Federal Constitutions.*

A. The said indictments were returned in violation of *Alabama Rule of Criminal Procedure* 12.6 in that persons unauthorized to be present during the grand jury session were present in the grand jury room, to wit: members of the Department of Health and other witnesses, resulting in prejudice to the defendant.

B. The grand jurors were not properly instructed pursuant to Rule 12.8(e) that they were not bound to find an indictment for any misdemeanor unless twelve members of the grand jury "think it is necessary for the public good."

C. The prosecutor failed to present exculpatory information to the jury.

II. *The Court Lacks Subject Matter and Personal Jurisdiction Over the Defendant and Over the Offense.*

A. The statute under which defendant is charged solely regulates the practice of Nurse Midwifery. It is undisputed that defendant is not a registered nurse, therefore her conduct cannot fall under the statute nor the jurisdiction of the court.

B. In addition, the *Alabama Code* specifies that the practice of Nurse Midwifery is limited to deliveries "planned to take place in the hospital," *Alabama Code,* Section 34-19-8, whereas defendant expects the uncontroverted evidence to show that the defendant's practice of Lay Midwifery was, in accordance with the traditional practice of Lay Midwifery in Alabama, limited to planned home births. Finally, defendant did not hold herself out to her clients, or to the community, as a Nurse Midwife. Thus, the defendant's activities do not fall under the statute nor the jurisdiction of the court.

III. *The Indictment in Case No. CC92-4198 Fails to State an Offense Under the Laws of Alabama.*

The offense of criminally negligent homicide requires that the defendant cause the death of a "human being who had been born and alive at the time of the homicidal act," *Alabama Code,* Section 13A-6-1(2) (defining "person when referring to victim of a criminal homicide"). The indictment, however, charges the defendant with causing the death of a "viable fetus." The indictment as written therefore fails to allege an essential element of the offense. In addition, the defendant expects that the uncontroverted evidence will show that the "viable fetus" alleged in the indictment was stillborn and, thus, was not

born or alive at the time of any alleged act as required by the statute.

IV. *The Indictments in CC92-3974 through CC92-3978 Fail to Allege as an Essential Element of the Offense that Defendant is a Nurse.*

V. *Section 34-19-3 of the Code of Alabama Under Which Defendant is Charged is Unconstitutional on its Face and as Applied to This Defendant.*

A. Said indictments are so vague, indefinite and uncertain as to be in violation of the due process and equal protection clauses of the Constitution of the United States of America, Amendment 6, and the Constitution of Alabama of 1901, Article I, Sections 1, 6 and 22.

B. Said indictments and the statute and regulations under which they are drawn are unconstitutional on their face and as applied to this defendant in that said statute and regulations are vague, uncertain, confusing and misleading in that said statute appears to apply to Midwifery as a whole while at the same time exempting the practice of Lay Midwifery from its scope.

C. Said indictment and the statute and regulations under which it is drawn violate defendant's right to privacy, as well as the privacy rights of her clients, on its face and as applied, in that said statute violates a woman's right to choose the manner and circumstances in which her baby is born, including her choice of whomever she wishes to assist her in childbirth as well as the place of childbirth.

D. Said indictments and the statute and regulations under which they are drawn violate defendant's right to privacy, both on its face and as applied, in that said statute requires the woman to give birth in a hospital rather than choosing to give birth at home.

E. Said indictments and the statute and regulations under which they are drawn are unconstitutional on

their face and as applied to this defendant in that said indictments and statute violate the right of the defendant to privacy and the free exercise of religion as well as the right to privacy and free exercise of religion of defendant's alleged clients in violation of the First Amendment to the Constitution of the United States of America and Article I, Section 3 of the Constitution of Alabama.

F. Said indictments and the statute and regulations under which they are drawn are overbroad in violation of the First and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 1 and 6 of the Constitution of Alabama of 1901, in that the statute is not specifically drawn to prevent the punishment of conduct not proscribed by the statute.

G. Said indictments and the statute under which they are drawn violate the equal protection clause of the state and federal constitutions in that said statute impermissibly distinguishes between members of the same class.

VI. *The Defendant is Being Selectively Prosecuted in Violation of the Due Process and Equal Protection Clauses of the Federal and State Constitutions.*

/s/ Douglas H. Scofield

Douglas H. Scofield
Attorney for Defendant,
Toni Darlene Kimpel

APPENDIX B

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA,	:	
	:	
v.	:	
	:	
TONI DARLENE KIMPEL,	:	
	:	Criminal Action
Defendant.	:	No. *CC-92-3974 through*
	:	*3978*

MOTION TO DISMISS

NOW COMES the defendant and refiles and realleges the motion to dismiss previously filed. The defendant would show unto the court that the indictment should be dismissed because Alabama Code (1975) § 34-19-3(A) prohibits only the practice of *nurse* midwifery without a license. The undisputed facts are that the defendant never held herself out as a nurse midwife and never planned for the delivery of babies to take place in a hospital. To the contrary, the undisputed facts are that the defendant was at all times a lay midwife assisting in traditional home birth of children. It is also undisputed that while the defendant sought to apply for a lay midwife permit, she did not have a lay midwife permit at anytime relevant hereto.

Because the reach of the criminal statute only applies to those practicing nurse midwifery without a license, the practice of lay midwifery without a permit is not a criminal violation. "One who commits an act which does not come within the words of a criminal statute, according to the general and popular understanding of those words,

when they are not used technically, is not to be punished thereunder, merely because the act may contravene the policy of a statute." *Clements v. State,* 370 So. 2nd 723, 725 (Ala. 1979).

/s/ Arthur J. Madden, III

Arthur J. Madden, III
MADDEN & SOTO
Attorney for Defendant
465 Dauphin Street
Mobile, Alabama 36602
(205) 432-0380

CERTIFICATE OF SERVICE

I hereby certify that I have on this 27th day of April, 1994, served a true and correct copy of the foregoing document by hand delivery, properly addressed on:

Jo Beth Murphree, Esq.
Assistant District Attorney
Third Floor
Mobile County Courthouse
Mobile, AL 36602

/s/ Arthur J. Madden, III

Arthur J. Madden, III

APPENDIX C

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

STATE OF ALABAMA, *

VS. * CC92-3974 Through
* 92-3978

TONI DARLENE KIMPEL *

ORDER

Defendant's Motion to Dismiss the indictments dated April 27, 1994 coming on to be heard this 28th day of April 1994, and the Court hearing oral argument from the State of Alabama and the Defendant, the Court finds as follows:

1. The Defendant has been charged in five indictments with violating § 34-19-3 of the Code of Alabama (1975).

2. Section 34-19-3(a) provides:

> It shall be unlawful for any person other than a licensed professional nurse who has received a license from the state board of nursing and the board of medical examiners to practice midwifery in this state. Any person violating this subsection shall be guilty of a misdemeanor.

3. Section 34-19-3(b) provides:

> Nothing in subsection (1) of this section shall be construed as to prevent lay midwives holding valid health department permits from engaging in the practice of lay midwifery as heretofore provided until such time as said permit may be revoked by the county board of health.

4. The question arises whether the statute maintains the practice of lay midwifery as a practice separate and distinct from nurse midwifery and whether the practice of lay midwifery without a valid permit constitutes a misdemeanor. Or, does the statute establish nurse midwifery as the only legal midwifery in Alabama?

5. The State argues that the statute abolishes the practice of lay midwifery and establishes nurse midwifery as the only legal midwifery practice allowable in the State of Alabama. With regard to subsection (b), the State contends that it merely provides that those lay midwives legally practicing at the time of the passage of the Act would be allowed to continue their lay midwifery practice until their health department permits were revoked. Had the State legislature intended that lay midwifery remain a legal practice of midwifery it would have specifically provided for its retention in the statute. By repealing the prior lay midwifery statute, and providing only for the licensed practice of nurse midwifery, the inference to be drawn is that the legislature intended that the practice of lay midwifery be prohibited, since the statute specifically provides for the practice of nurse midwifery only, and provides a criminal penalty for failure to comply with the Act.

6. The defendant argues that subsection (b) of the statute recognizes a category of midwifery known as lay midwifery which is separate and distinct from nurse midwifery, and that, furthermore, it remains unregulated by the statute since subsection (b) contains no sanctions for the practice of lay midwifery without a permit. The only criminal sanctions imposed are in subsection (a) which applies to nurse midwifery as opposed to lay midwifery. If the legislature had intended that practicing lay midwifery without a permit constitutes a misdemeanor, it could have so provided. It did not. Accordingly, the court finds

that the statute could be interpreted either way and is vague and ambiguous.

WHEREFORE, it is ordered that the Defendant's Motion to Dismiss is granted.

DONE and ORDERED this the 4th day of May, 1994.

/s/ ROBERT E. L. KEY

ROBERT E. L. KEY
Circuit Judge

APPENDIX D

Released March 3, 1995

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of *Southern Reporter*. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36130-1555 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in *Southern Reporter*.

ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1994-95

CR-93-1361

State

v.

Toni Darlene Kimpel

Appeal from Mobile County

(CC-92-3974 through -3978)

PATTERSON, JUDGE

Toni Darlene Kimpel was charged, in five separate indictments, with practicing nurse midwifery without a license. This offense is a misdemeanor under § 34-19-3, Code of Alabama 1975. The trial court, holding that § 34-19-3 is "vague and ambiguous,"[1] dismissed the indict-

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[1]Vague or ambiguous criminal statutes are unconstitutional. United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954), Senf v. State, 622 So.2d 435 (Ala.Cr.App. 1993).

ments in a pretrial order. The state appeals the trial court's ruling.

Kimpel argues that this court is without jurisdiction to hear this appeal. She relies on Rule 15.7(a), Ala.R. Crim.p.:

> "[a]n appeal may be taken by the state in a *felony* case to the Court of Criminal Appeals from a pre-trial order of the circuit court (1) suppressing a confession or admission or other evidence, (2) dismissing an indictment, information, or complaint (or any part of an indictment, information, or complaint), (3) quashing an arrest or search warrant. Such an appeal may be taken only if the district attorney certifies to the Court of Criminal Appeals that the appeal is not brought for the purpose of delay and that the order, if not reversed on appeal, will be fatal to the prosecution of the charge."

(Emphasis added.) Kimpel notes that this court has interpreted Rule 15.7 to be the exclusive avenue for a pretrial appeal by the state in a criminal case and to be inapplicable to misdemeanors. In *City of Attalla v. Smith*, 596 So.2d 651, 651 (Ala.Cr.App. 1992), this court held, "[r]ule 15.7 allows pretrial appeals by the State only in felony cases. There is no provision for a pretrial appeal by the state in a misdemeanor case." We find, however, that the rationale of *City of Attalla v. Smith* is incorrect, because it flies in the face of the state's statutory right to appeal judgments holding statutes unconstitutional.

Section 12-22-91, provides another means by which the state may appeal a trial court's judgment:

> "*In all criminal cases* when the act of the legislature under which the indictment or information is preferred is held to be unconstitutional, the district attorney may take an appeal in be-

> half of the state to the supreme court, which appeal shall be certified as other appeals in criminal cases, and the clerk must transmit, without delay, the record on appeal and the notice of appeal to the supreme court."

(Emphasis added.) This provision originally appeared as § 4515, Code of Alabama of 1886. At that time, the Supreme Court was the only appellate court in Alabama. Therefore, the term "supreme court" was not intended to deny jurisdiction to the Court of Criminal Appeals, which was established in 1969, or to our predecessor, the Court of Appeals, which was established in 1911. See, e.g., *State v. Street,* 117 Ala. 203, 23 So. 807 (1898) (deciding direct appeal under the predecessor to § 12-22-91, in the absence of any other existing state appellate court).

The judicial history of this statute demonstrates that the Alabama Supreme Court and the Court of Criminal Appeals agree that appeals under § 12-22-91 may properly be brought initially to this court. *State v. Gooden,* 570 So.2d 865 (Ala.Cr.App. 1990) (affirming trial court, pursuant to § 12-22-91), *State v. Franklin,* 541 So.2d 593 (Ala.Cr.App. 1989) (reversing trial court, on transfer from the Supreme Court and pursuant to § 12-22-91), *State v. Clayton,* 492 So.2d 665 (Ala.Cr.App. 1986) (reversing trial court, pursuant to § 12-22-91), *State v. Woodruff,* 460 So.2d 325 (Ala.Cr.App. 1984) (reversing trial court, pursuant to § 12-22-91), *State v. Spurlock,* 393 So.2d 1052 (Ala.Cr.App. 1981) (reversing trial court, pursuant to § 12-22-91), *State v. Wilkerson,* 54 Ala.App. 104, 305 So.2d 378 (reversing trial court, pursuant to the predecessor to § 12-22-91), cert. denied, 293 Ala. 774, 305 So.2d 382 (1974). Although there are several cases in which the Supreme Court has decided a § 12-22-91 issue on direct appeal, *State v. Rogers,* 281 Ala. 27, 198 So.2d 610 (1967), *State v. Mills,* 278 Ala. 188, 176 So.2d 884 (1965), rev'd on

other grounds, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966), *State v. Cecil,* 216 Ala. 391, 113 So. 254 (1927) (deciding, pursuant to the predecessor to § 12-22-91, an appeal certified and transferred to Supreme Court from Court of Appeals), those cases were decided under § 7310, Code of Alabama of 1923, and its progeny. Section 7310 required that all appeals challenging the constitutionality of a statute must be heard by the Supreme Court, as opposed to the Court of Appeals. This statute was repealed by the adoption of the Code of Alabama 1975. The codifiers considered and rejected the idea of limiting our intermediate appellate courts' jurisdiction over constitutional issues.

Under § 12-22-91, the state may appeal the trial court's judgment in any case where the trial court holds the statute creating an offense unconstitutional. *State v. Gautney,* 344 So.2d 232 (Ala.Cr.App. 1977), and *State v. Powe,* 28 Ala.App. 402, 185 So. 781 (1939). When a statute is held unconstitutional by a pretrial order, that order is a final judgment and the state may appeal under § 12-22-91. See § 12-22-2 (stating that an appeal must be from a final judgment). See also *Sparks v. State,* 40 Ala.App. 551, 554, 119 So.2d 596, 599 (1959) ("A final judgment, decision or order which will support an appeal, is one which puts an end to the proceedings between the parties to a cause in the court, and leaves nothing further to be done."), cert. denied, *Sparks v. State,* 270 Ala. 488, 119 So.2d 600 (1960). Furthermore, § 12-22-91 applies to both misdemeanor and felony cases. See *State v. Hewlett,* 124, Ala. 471, 27 So. 18 (1899) (applying § 12-22-91 to a misdemeanor), and *City of Mobile v. Welch,* 572 So.2d 1322, 1323 (Ala.Cr.App. 1990) (same), quoted in *Ex parte Adams,* 592 So.2d 641 (Ala. 1991).

Therefore, although Rule 15.7 does not give this court jurisdiction over this appeal, the state's appeal is properly

before this court by virtue of § 12-22-91.[2] That portion of *Attalla v. Smith* that conflicts with this opinion is expressly overruled.

II.

The state contends that the trial court erred in concluding that § 34-19-3 was unconstitutionally vague. Section 34-19-3 states:

> "(a) It shall be unlawful for any person other than a licensed professional nurse who has received a license from the state board of nursing and the board of medical examiners to practice nurse midwifery in this state. Any person violating this subsection shall be guilty of a misdemeanor.
>
> "(b) Nothing in subsection (a) of this section shall be construed as to prevent lay midwives holding valid health department permits from engaging in the practice of lay midwifery as heretofore provided until such time as said permit may be revoked by the county board of health."

When construing the language of a statute, "it is a court's duty to give effect to the intent of the legislature as expressed in the words contained in the statute." *Ex parte Rodgers*, 554 So.2d 1120 (Ala. 1989).

In this case, both the words and the meaning of Alabama's midwifery statute are clear on the face of the statute. Section 34-19-3(a) prohibits one specific category of conduct, "the practice of nurse midwifery," defined as,

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[2]Rule 15.7 and § 12-22-91 serve different functions. Rule 15.7 allows the state to preserve the prosecution of an individual if the trial court errs in a way that will be fatal to the state's advancement of that particular case. Section 12-22-91 allows the state to preserve a prosecution if the trial court errs in a way that will be fatal to future prosecutions under that statute.

"[c]are for the mother during pregnancy and labor providing continuous physical and emotional support and evaluation of progress throughout labor and delivery." § 34-19-2(2), Code of Alabama 1975. These sections provide adequate notice of what conduct is prohibited.

Each of the indictments issued by a Mobile County grand jury reads in pertinent part:

> "Toni Darlene Kimpel . . . did, by agreement or contract for payment or other payment or consideration, provide care, management, evaluation, examinations, prenatal care, advice and assistance as a nurse midwife during the pregnancy and delivery of a child . . ."

Kimpel's vagueness challenge is predicated on her assertion that she practiced lay midwifery, rather than nurse midwifery. Because nurse midwifery is defined by statute, and because the term "lay midwives" appears in the statute without definition, Kimpel argues that the statute does not prohibit her midwifery practice. This argument is without merit.

"[T]he essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct." *Jordan v. De George,* 341 U.S. 223, 230, 71 S.Ct. 703, 707, 95 L.Ed. 886 (1951). First, these indictments allege conduct that, if proven, would clearly be prohibited by § 34-19-3. Second, the term "lay midwives" appears in § 34-19-3(b), which allows "lay midwives holding valid health department permits," to continue the practice of lay midwifery. Kimpel has never possessed such a permit.[3] This statute clearly prohibits a nar-

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[3]In fact, no one possesses a valid health department permit for the practice of lay midwifery. This provision was grandfathered in the 1975 Code. All those who previously held these permits have terminated their practice, and the health department no longer issues such permits.

rowly defined class of conduct. We therefore find that this statute is neither vague nor ambiguous.

III.

Kimpel argues that Alabama's midwifery statute is unconstitutional because, she contends, it constitutes an invasion of privacy and violates her right to Equal Protection under the law. These contentions are without merit.

A.

In *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the Supreme Court recognized that the state has a legitimate interest in providing for the safety of a viable fetus. When the fetus is viable (the court determined that viability begins at the end of the first trimester), the mother's privacy rights are subjugated to the governmental interest in protecting both hers and the child's safety. See also *People v. Rosburg,* 805 P.2d 432 (Colo. 1991) (holding that under *Roe,* the right to privacy does not extend to choosing the manner of childbirth, specifically, midwifery), accord *Bowland v. Municipal Court for Santa Cruz County,* 18 Cal.3d 479, 556 P.2d 1081, 134 Cal.Rptr. 630 (1976). Therefore, the constitutionally protected right to privacy is not violated by a statute regulating the practice of midwifery.

B.

In an equal protection analysis of a law that does not involve a suspect class, the proper standard of review is whether that statute is rationally related to a legitimate government objective. *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974).

The Alabama statute regulating the practice of midwifery does not involve a suspect class. Furthermore, as

illustrated above, in discussing *Roe,* protection of the safety of a mother and child during labor and delivery is a legitimate government objective. Therefore, this statute does not violate the equal protection guarantees of either the federal or our state constitution.

The trial court is instructed to set aside its order dismissing the indictments and to restore them to the trial docket for appropriate disposition.

REVERSED AND REMANDED.

TAYLOR, P.J., McMILLAN, COBB, JJ., CONCUR; LONG, J., RECUSES HIMSELF.

APPENDIX E

IN THE SUPREME COURT OF ALABAMA
June 30, 1995

1941044

Ex parte Toni Darlene Kimpel. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: State v. Toni Darlene Kimpel) (93-1361) (Mobile: CC-93-3974)

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COSTS TAXED TO PETITIONER.

SHORES, J. - Hornsby, CJ., Maddox, Kennedy and Cook, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness may hand this 30 day of June, 1995.

/s/ ROBERT G. ESDALE

ROBERT G. ESDLAE
Clerk, Supreme Court of Alabama

APPENDIX F

CHAPTER 19.
MIDWIVES.

Sec.

34-19-1. Repealed.
34-19-2. Definitions.
34-19-3. License for practice of nurse midwifery required; continuation of practice of lay midwifery.
34-19-4. Application for license.
34-19-5. Issuance, renewal, suspension and revocation of licenses; fee.
34-19-6. Practices which may be performed by licensees — Generally.
34-19-7. Same — Restrictions generally.
34-19-8. Same — Attendance, etc., in cases of abnormal childbirth; location of deliveries.
34-19-9. Designation of midwife certification on professional nursing license.
34-19-10. Promulgation of rules and regulations, procedures, standards, etc., for nurse midwives.

§ 34-19-1. Repealed by Acts 1976, No. 499, p. 624, § 10, effective August 23, 1976

§ 34-19-2. Definitions.

When used in this chapter, the following words and phrases shall have the following meanings, respectively, unless the context clearly indicates otherwise:

(1) NURSE MIDWIFE. A registered nurse who by virtue of added knowledge and skill gained through an organized program of study and clinical experience recognized by the American College of Nurse-Midwives has extended the limits of her practice into the area of

management of care of mothers and babies throughout the maternity cycle so long as progress meets criteria accepted as normal.

(2) PRACTICE OF NURSE MIDWIFERY. Care for the mother during pregnancy and labor providing continuous physical and emotional support and continuous evaluation of progress throughout labor and delivery.

(3) NORMAL CHILDBIRTH. Delivery, at or close to term, of a pregnant woman whose physical examination by a physician reveals no abnormalities. (Acts 1976, No. 499, p. 624, § 1.)

§ 34-19-3. License for practice of nurse midwifery required; continuation of practice of lay midwifery.

(a) It shall be unlawful for any person other than a licensed professional nurse who has received a license from the state board of nursing and the board of medical examiners to practice nurse midwifery in this state. Any person violating this subsection shall be guilty of a misdemeanor.

(b) Nothing in subsection (a) of this section shall be construed as to prevent lay midwives holding valid health department permits from engaging in the practice of lay midwifery as heretofore provided until such time as said permit may be revoked by the county board of health. (Acts 1976, No. 499, p. 624, § 1.)

Cross references. — As to board of nursing and nurses generally, see § 34-21-1 et seq. As to board of medical examiners generally, see §§ 34-24-53 and 34-24-54.

Collateral references. — 70 C.J.S., Physicians & Surgeons, §§ 1, 10.

61 Am. Jur. 2d, Physicians, Surgeons, etc., § 29.

Midwifery: state regulation. 59 ALR4th 929.

§ 34-19-4. Application for license.

A person desiring to obtain a license to enter into the practice of nurse midwifery shall make written application to the board of nursing and the board of medical examiners. Every applicant for a license to practice midwifery must be a licensed registered nurse and possess a certificate from a school for nurse midwives recognized by the American College of Nurse-Midwives. (Acts 1976, No. 499, p. 624, § 2).

§ 34-19-5. Issuance, renewal, suspension and revocation of licenses; fee.

(a) The state board of nursing and the board of medical examiners may issue or refuse to issue or, having issued, may suspend or revoke licenses to practice nurse midwifery under the provisions of this chapter in accordance with such rules and regulations promulgated under the provisions of this chapter.

(b) Licenses issued under this chapter shall be renewable biennially at such time and in such a manner as prescribed by the state board of nursing and the board of medical examiners.

(c) Suspension and revocation of licenses shall be by the state board of nursing and the board of medical examiners for due cause after investigation.

(d) The state board of nursing and the board of medical examiners are hereby authorized to levy and collect a fee for the issuance and renewal of licenses to practice nurse midwifery pursuant to this chapter. (Acts 1976, No. 499, p. 624, § 3; Acts 1989, No. 89-243, p. 349, § 3.)

§ 34-19-6. Practices which may be performed by licenses — Generally.

A person holding a license to practice midwifery issued by the state board of nursing and the board of medical

examiners may provide maternity care to patients, including prenatal care, deliver normal pregnancies and administer postnatal care. The above care will be done under appropriate physician supervision. (Acts 1976, No. 499, p. 624, § 6.)

Collateral references. — Midwifery: state regulation. 59 ALR4th 929.

§ 34-19-7. Same — Restrictions generally.

The licenses issued under this chapter shall not confer upon any person the right to practice medicine, to undertake the charge of abnormal cases of confinement or any disease in connection with confinement or to assume any name, title, or designation implying that such person is authorized by law to undertake the charge of any such cases or to practice medicine. (Acts 1976, No. 499, p. 624, § 5.)

§ 34-19-8. Same — Attendance, etc., in cases of abnormal childbirth; location of deliveries.

It shall be unlawful for any person holding a license as a nurse midwife to attend any cases except cases of normal childbirth, as defined in section 34-19-2, or to perform manipulations of any kind. In all cases in which the child is not delivered spontaneously within a reasonable time, the nurse midwife shall notify a qualified physician immediately and make no effort to deliver the child except under the authorization and supervision of such physician.

All deliveries must be planned to take place in the hospital. (Acts 1976, No. 499, p. 624, § 7.)

§ 34-19-9. Designation of midwife certification on professional nursing license.

Individuals meeting the requirements set forth shall have their professional nursing license also designated certified nurse midwife (C.N.M.) upon the payment of required fees. (Acts 1976, No. 499, p. 624, §8; Acts 1989, No. 89-243, p. 349, § 3.)

Collateral references. — Midwifery: state regulation. 59 ALR4th 929.

§ 34-19-10. Promulgation of rules and regulations, procedures, standards, etc., for nurse midwives.

The state board of nursing and the board of medical examiners shall have the authority and power to make and promulgate such rules and regulations as may appear necessary and proper to carry out the purposes of this chapter, including, but not limited to, minimum educational and physical requirements for nurse midwives, the procedures and techniques to be employed in the practice of nurse midwifery and the ethical standards to be observed by nurse midwives. (Acts 1976, No. 499, P. 624, § 4.)

Collateral references. — Midwifery: state regulation. 59 ALR4th 929.

APPENDIX G

CHAPTER 9.
MIDWIVES.

Sec.
168. Practice of midwifery regulated.

§ 168. (1064) (711) Practice of midwifery regulated.—It shall be unlawful, for any person, other than a regularly licensed physician, to practice as a midwife without first making written application for and receiving a permit to practice midwifery from the county board of health. The term "midwife" shall be construed to include any person, other than a regularly licensed physician, who shall attend, or who shall bargain, contract, or agree to attend, any woman at or during childbirth. Any person violating this section shall be guilty of a misdemeanor, and upon conviction, upon the first offense, shall be fined not less than ten dollars or imprisonment for not less than one month, and for subsequent offenses shall be fined not less than fifty dollars, nor more than five hundred dollars, or imprisoned for not less than three months nor more than six months, or both. County boards of health shall from time to time, upon written application made in such form and in such manner as may be prescribed by the state board of health, either by a schedule of questions to be answered and subscribed, or orally, examine any person of a good moral character and temperate habits who desires to engage in the practice of midwifery, as to his or her qualifications and knowledge of the art; and if a majority of the county board of health shall be satisfied that such person is competent to engage in the practice of midwifery, said board shall enter the name of such person as a registered midwife in a book provided for that purpose, and may at its discretion issue to such person a permit to practice mid-

wifery to be signed by the chairman of said board, and countersigned by the health officer. No permit to practice midwifery shall be issued by a county board of health to any person, unless such person shall present to said county board of health satisfactory evidence of having or possessing sufficient knowledge and skill in the art of midwifery, and that such person is free from a communicable disease, and of good moral character. The said permit may be revoked by the county board of health at any time, after proper investigation because of failure to comply with the provisions of this chapter, or the rules and regulations of the state board of health applying to midwifery. (1919, p. 909; 1935, p. 929).